

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
REPLY BRIEF**

No. 77-6049

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IN THE
United States Court of Appeals
FOR THE SECOND CIRCUIT

No. 77-6049

SECRETARY OF THE INTERIOR, *et al.*, Appellants,

v.

COUNTY OF SUFFOLK, *et al.*, Appellees.

On Appeal From the United States District Court for the
Eastern District of New York

REPLY BRIEF OF APPELLANTS
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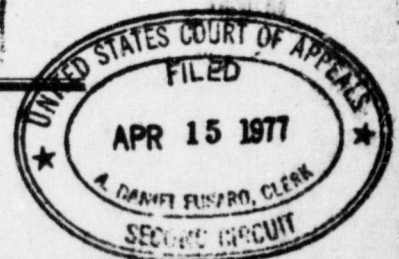


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REPLY BRIEF OF APPELLANTS
NATIONAL OCEAN INDUSTRIES ASSOCIATION, ET AL.

I. INTRODUCTION

At the outset of the argument in our opening brief (pp. 13-16), we demonstrated that Judge Weinstein struck down Sale No. 40 on relatively insignificant grounds, which were themselves articulated in contravention of a number of prior judicial precedents, to spare the Mid-Atlantic OCS from development, notwithstanding the relatively small risk that serious environmental harm would occur there. Although plaintiff-appellees and a supporting amicus have filed briefs totalling 285 pages they have failed to advance anything to counter this showing.

Appellees, at times quite candidly^{1/} and at other

1/ See e.g. Suffolk County (hereafter "S.C.") Br. 58-77, discussing allegedly inadequate consideration of increasing other off-shore and new on-shore production, greater conservation, using OCS Sale No. 40 as a strategic reserve, etc.; Nassau County (hereafter "N.C.") Br. 18, where it is conceded that "the EIS discussion of marine environmental impacts . . . [has] been found by the Lower court to have been adequately covered in EIS No. 40."

times less so,^{2/} attempt to defend the decision below upon grounds which were clearly rejected by Judge Weinstein. We will not in this reply brief engage the appellees on these latter issues, given the limitations of time and space which confront us.

We do note, however, that in rejecting virtually all of what appellees refer to as "an extraordinarily comprehensive evidentiary presentation" (S.C. Br. 2), Judge Weinstein, as we previously showed (NOIA Br. 53-57), improperly indulged in de novo review of Interior's compliance with NEPA. Indeed, even appellees admit he undertook "an unprecedented fact-intensive" trial of a NEPA case. (S.C. Br. 2). That Judge Weinstein was nonetheless compelled by the evidence to uphold the EIS with respect to the broad range of contentions advanced by appellees, adds emphasis to the point which we made in our opening brief that he invalidated the Sale No. 40 decision on relatively trivial grounds, which, for the most part, plaintiffs did not even raise.

The appellees also effectively concede another basic

^{2/} Into the latter category, falls the extensive discussion in several briefs of the EIS's purportedly inadequate discussion of on-shore impacts of OCS activities (N.C. Br. 10-19; NRDC Br. 18, 31), of the spill trajectory analysis used to evaluate the likelihood of oil spills reaching shore (S.C. Br. 7), the alleged overstatement of actual reserves which may underlay the Sale No. 40 region (S.C. Br. 22), and amicus Tri-County Committee's attack upon the analysis of tanker spills (T.C.C. Br. 18, 25-26).

We are compelled to note the particularly misleading character of T.C.C.'s argument on this last point. For while the amicus correctly recites that the USGS criticized the EIS's analysis of tanker spills, it improperly seeks to leave the impression that such criticisms show the EIS inadequately informed the Secretary of the risks of tankering oil. (See T.C.C. Br. 25-26). The fact is, the USGS criticized the tanker spill analysis for over-estimating the risks of tankering oil (III EIS 162). See also to the same effect the testimony of the expert on oil spill probability studies. (T. Tr. 800).

point made by NOIA at the very outset of its earlier brief. They nowhere dispute the CEQ testimony and the EPA analysis which shows the Mid-Atlantic OCS region is much safer, environmentally, than other regions that are now being developed under the accelerated OCS leasing program. (See NOIA Br. 15-16). NRDC does observe that a recent Congressional Report (Ex. G) indicated that pipeline accidents may be a source of OCS-related spills.^{3/} (NRDC Br. 18). But of far more significance with respect to the environmental safety of operations in the Mid-Atlantic region is the very first finding recited on the first page of that report:

"Most oil pollution in the ocean comes from vessels, especially tankers, and from waste oil in municipal and industrial effluents. A five-percent reduction in oil pollution from either of these sources would have a more positive impact on the marine environment than elimination of all off-shore production. Transportation (tankers primarily) contributes an estimated 35% of all ocean oil pollution. River and urban run-off contributes 31%, and off-shore production 1.3%."

As anyone even remotely familiar with the Mid-Atlantic region knows and as was recognized explicitly in the EIS itself (I EIS 395-404), the Mid-Atlantic region today imports, via tanker, the vast majority of its petroleum needs, so that satisfying those needs

^{3/} Of course, Judge Weinstein found that the integrity of pipeline and other OCS operations in the Mid-Atlantic area was "the most clearly established fact in the case." (Order 7, JA 162). Moreover, as the evidence clearly shows (T. Tr. 966,974-75), OCS pipelines are subjected to rigorous control by several federal agencies to guard against pipeline ruptures.

via OCS production pipelines to shore would have a net positive impact on the environment.^{4/} Thus, as the Report also concluded:

"Based on experience to date and the probability of spills, off-shore OCS production will be less damaging to the environment than importing a like amount of petroleum." (Ex. G, p. 1).

Finally, appellees do not successfully refute the third of the basic points made by NOIA at the outset of its opening brief -- that each of the many other NEPA/OCS cases which have decided or potentially raised all the issues presented here were simply ignored by Judge Weinstein in his final decision. To be sure, appellees at least advance arguments in attempting to justify his disregard of this long line of prior authority, but the strained and tenuous nature of those arguments itself reveals the weakness of their position and the patent error in Judge Weinstein's own attitude toward these cases.^{5/}

Perhaps the most glaring omission in Judge Weinstein's decision is his failure to refer even once to the leading NEPA/OCS case, Sierra Club v. Morton (MAFLA), 510 F.2d 813 (5th Cir. 1975), which addressed and directly rejected so many of the conclusions

4/ Amicus T.C.C. inadvertently underscores this proposition by stressing the disastrous effects that could flow from an oil spill at a deepwater port for supertankers. (T.C.C. Br. 13).

5/ Suffolk County incorrectly argues that Alaska v. Kleppe, 9 E.R.C. 1497 (D.D.C. 1976), on appeal, D.C. Cir. No. 76-1826, involved only an application for preliminary injunction. Alaska v. Kleppe arose upon a trial on the merits and involved a final judgment for the Government. California v. Morton, 404 F.Supp. 26 (C.D. Calif. 1975), on appeal, 9th Cir. 76-1431, decided legal issues in a fashion directly contrary to Judge Weinstein here and cannot be distinguished on the evidentiary basis advanced by appellees.

articulated by Judge Weinstein's February 17 decision, including the contention that an EIS must specify pipeline corridors. Equally striking is the argument advanced by appellees with respect to the purported inapplicability of the MAFLA decision here:

"Presumably, tanker/pipeline operations in the Gulf of Mexico are long-established, accepted activities which do not pose the same menace as they do in the congested Mid-Atlantic region . . . and do not evoke the state-local response anticipated for Sale 40." (S.C. Br. 81).

Appellees go on to observe that spills from the Sale No. 40 region would "strand on valuable prime beaches and recreation areas," presumably implying that the many resort beaches and recreation areas enjoyed by the citizens of and visitors to the Mississippi-Alabama-Florida (i.e. MAFLA) region of the Gulf of Mexico, which contrary to NRDC (Br. 58) was a frontier area where no OCS operations had ever occurred, are less deserving of protection than those of the Northeast.^{6/}

While the appellees feel that they are uniquely impacted by OCS operations, they are no different than anyone else. Just like the plaintiffs in California v. Morton, supra, 404 F. Supp. at 30, appellees' position here is the "short-sighted," yet familiar, "urging to use some other frontier for undersea experimentation and to come to [the plaintiffs'] shores only when a fail-safe process has emerged." OCS operations

^{6/} In this regard, it is particularly noteworthy that the only political entities appearing as plaintiffs here are the two eastern-most counties of Long Island, an area where there is a de minimis possibility of any pipelines running ashore from the Sale No. 40 area. (II EIS 227).

everywhere raise "a highly volatile political question." (Id.). Thus, the uniform conclusion of a number of courts in prior OCS cases, involving similar factual and legal issues, that Interior had met its NEPA obligations cannot be dismissed on the parochial grounds advanced by appellees here, nor can Judge Weinstein's disregard for those decisions be excused on this basis.

II. APPELLEES IMPROPERLY RELY UPON JUDGE WEINSTEIN'S DE NOVO REVIEW OF INTERIOR'S COMPLIANCE WITH NEPA TO SHIELD HIS DECISION FROM THIS COURT'S SCRUTINY

We urged in our opening brief that Judge Weinstein improperly conducted a trial de novo and evaluated the evidence which he received as though he could weigh that evidence and draw whatever conclusions he wanted from it. (See NOIA Br. 53-57). Appellees dispute, unsuccessfully for the reason shown in our opening brief (pp. 53-55), the applicability of cases such as Camp v. Pitts, 411 U.S. 138 (1973), concerning the impropriety of a trial court's even receiving de novo evidence in a NEPA case. But, at no point in their answering briefs do they cite a single case under NEPA or the APA contradicting the authority advanced by appellants in their opening briefs^{7/} condemning

7/ Udall v. Washington, Virginia and Maryland Coach Company, 398 F.2d 765, 769 (D.C. Cir. 1968); Independent Meatpackers Ass'n v. Butz, 526 F.2d 228 (8th Cir. 1975); Temple University v. Associated Hospital Service of Philadelphia, 361 F. Supp. 263, 271 (E.D.Pa. 1973); Environmental Defense Fund v. Froehlke, 368 F.Supp. 231, 240 (W.D.Mo. 1973), aff'd, 497 F.2d 1340 (8th Cir. 1974):

"[NEPA] did not, in our judgment, contemplate

[footnote cont.]

a trial court's weighing of such evidence in the manner employed by Judge Weinstein here.

At the same time, plaintiffs do not deny that Judge Weinstein did so weigh the evidence and did credit or ignore testimony as he saw fit, as though he was trying a negligence, anti-trust, or tort case. Indeed, far from suggesting that Judge Weinstein did not weigh the evidence, the appellees rely upon the fact that he did as a basis for insulating his decision from plenary review in this Court.

Thus, Suffolk County concedes (S.C. Br. 47) that the "clearly erroneous" standard of review does not apply "where the credibility of witnesses is not at stake," citing this Court's recent decision in New York v. NRC, 9 E.R.C. 1825, 1830 n. 6 (1977), as well as San Filippo v. United Brotherhood of Carpenters & Joiners, 525 F.2d 508, 511 (2d. Cir. 1975). However, it goes on to stress the "propriety of the district court's receiving and weighing" the allegedly "conflicting testimony by witnesses," and then "making findings of fact based upon its resolution of

[footnote cont.]

or anticipate that courts were to make choices and determine the merits of conflicting views between the two or more schools of scientific thought and to thereafter disapprove any final EIS which may rely upon data which was inconsistent with the court's finding."

the conflicts in testimony" (S.C.Br. 48-49) to conclude that the clearly erroneous standard should be followed here.^{8/}

But, of course, in the light of the appellees' failure to support Judge Weinstein's weighing of the evidence below, it obviously is improper for them now to rest upon his error in this regard to limit this Court's review of his decision.

Wholly apart from his error in weighing de novo testimony, there are other reasons why this Court is not limited by the "clearly erroneous" standard of review here. As the opinion below demonstrates, there were, in fact, only three witnesses whose testimony was relied upon -- Mr. Brunjes, the Shell pipeline planning expert; Ms. Gresham, the BLM employee who participated in the pre-EIS tract-selection process, and Mr. Donkin, the appellees' expert who, among many other things,^{9/} criticized the PDOD

8/ We are also compelled to note Suffolk County's mistaken reliance on *Triebwasser & Katz v. AT&T*, 535 F.2d 1356, 1358 (2d. Cir. 1976), for the proposition that Judge Weinstein should be reversed here only for an abuse of discretion. (S.C.Br. 47). That case involved review of a trial court's preliminary injunction order, not final judgment. Moreover, as NOIA demonstrated in its brief to this Court in connection with Judge Weinstein's August 13 order (NOIA Br. No. 76-6122, pp. 20-21), there was no warrant for following the abuse of discretion standard even with respect to that order in light of the issues raised in this litigation, citing *Maryland-National Cap. Pk. & P.L. Comm'n v. U.S. Postal Service*, 487 F.2d 1029, 1041 (D.C.Cir. 1973); *NRDC v. Morton*, 458 F.2d 827, 832 (D.C.Cir. 1972).

9/ The all-purpose nature of the expertise professed by Mr. Donkin can be perceived from Suffolk County's reliance on his testimony as to a broad range of issues (See S.C.Br. 51, 60-67), including his statement during the August 1976 hearings that the natural gas shortage is "not of crisis proportions." (S.C.Br. 61).

with respect to the investment costs and production rates associated with Sale No. 40.

As to Mr. Brunjes, Judge Weinstein accepted his testimony "in full" because he was impressed with both his "honesty" and "skill" (Dec. 42, JA 64). Thus, this Court is in as good a position as Judge Weinstein was to assess the Brunjes' testimony (including his testimony as to pipeline costs) with complete assurance that Judge Weinstein's treatment of that testimony cannot be explained by his assessment of the witness's demeanor or other factors bearing upon witness credibility.

By the same token, Judge Weinstein relied on the Gresham testimony and accepted everything she said. The issues raised by appellants here with respect to her testimony do not go to its credibility, but instead to its legal effect. For it is appellants' position that her description of the pre-EIS tract-selection process simply has no bearing upon whether Interior complied with NEPA in its consideration of alternatives to the proposed action. (See NOIA Br. 41-45).

Finally as to Donkin, it is appellants' position that the comparison of his testimony with other evidence in the record, such as Mr. Brunjes' analysis of pipeline costs, does not as a matter of law support the conclusion that the Secretary's decision can be invalidated. (NOIA Br. 56-60).

In short, this Court can review Judge Weinstein's decision without regard to the limitations of the "clearly

erroneous" rule. New York v. NRC, supra. See also NRDC v. Callaway, 524 F.2d 79, 82, 85 n.7 (2d. Cir. 1975), refusing to be limited by the "clearly erroneous" standard even when reviewing, unlike Judge Weinstein's decision here, a "thorough and carefully considered" analysis by the trial court of an impact statement's adequacy. The errors permeating the decision below are errors of law, not ones turning upon the assessment of witness credibility, and thus can receive full and complete scrutiny from this Court.

We turn now to a showing that such scrutiny must inevitably lead to a reversal of Judge Weinstein's February 17 decision.

III. APPELLEES HAVE NOT CONTRADICTED APPELLANTS' SHOWING THAT JUDGE WEINSTEIN ERRED IN HIS RESOLUTION OF THE STATE AND LOCAL LAND-USE REGULATION/PIPE-LINE ISSUE

A. Appellees Have Not Countered Appellants' Showing That Pipeline Corridors Cannot Be Defined Prior to Exploration of the Sale No. 40 Region

Although the appellees devote more of their argument to the pipeline location issue than to any other point, they have either by their silent acquiescence in the arguments advanced in the appellants' briefs or by their explicit concessions reinforced

the reasonableness of the EIS's posture with respect to this issue.

To briefly recapitulate that posture:

The EIS first sets forth an exhaustive discussion of all aspects of the construction and operation of OCS pipelines as they might affect the coastal zone, which adequately placed the Secretary on notice as to the general hazards of running pipelines to shore from the Sale No. 40 area. (See NOIA Br. p. 24 n.16).

The EIS next recognizes that exploration will take place before the construction of any pipelines or other production facilities. During that time, which the EIS states will take at least three years, a figure accepted by both the appellees (see e.g. NRDC Br. 32) and Judge Weinstein (see Order 76, JA 231), efforts will be undertaken by the lessees to determine the existence, amount, location, types, etc., of any Sale No. 40 oil, as well as other matters bearing upon pipeline placement. Indeed, Judge Weinstein himself recognized in other parts of his opinion, which he ignored when faulting the EIS for failing to specify pipeline corridors, that "only on-the-spot exploratory drilling can determine what, if any, hydrocarbons will be available" (Dec. 59, JA 82) and that the quantification of "daily production rates and reserves [of hydrocarbons]" will ultimately affect the "timing, locations, size and number of pipelines" (Dec. 57, JA 79).^{10/}

The EIS also recognizes (II EIS 516-19) and the evidence in this case shows without contradiction (see NOIA Br. 28-29)

^{10/} See also OTA Report, Coastal Effects of Offshore Energy Systems (Ex. 201, JA 3002, pp. 144-45, 149-50, 159) recognizing that pipeline corridor decisions must await the post-exploration, developmental phase of Sale No. 40. See also S.C. Br. 12.

that during this period the affected Mid-Atlantic states will complete the development of their Coastal Zone Management Act (CZMA) programs which will reflect the States' policies with respect to OCS pipelines in their coastal zones and, which, under the "consistency" provision of the CZMA, Section 307(c), 16 U.S.C. § 1457(c), will control the placement of those pipelines.^{11/} In this regard, appellees in no way contradict the demonstration contained in NOIA's opening brief (pp. 29-32) that the posture adopted by the EIS of not making siting decisions for pipelines until after adoption of CZMA programs was in accordance with the position of the Governor of New Jersey, as well as Cape May County.

Finally, following the completion of exploration and the preparation of CZMA programs, Interior will ensure that pipelines are placed in environmentally suitable corridors. See III EIS 242, where New Jersey complimented Interior for adopting an explicit stipulation in the Sale No. 40 leases laying down this requirement.

Notwithstanding the manner in which the EIS's approach to the pipeline corridor issue thus allows both Interior's control

^{11/} NRDC asserts that these CZMA programs could well prohibit the placement of any pipelines in coastal zones of Mid-Atlantic states and still meet the requirement of CZMA § 306(c)(8), 16 U.S.C. § 1456(c)(8), that the "management program provides for adequate consideration of the national interest involved in planning for, and in the siting of, facilities (including energy facilities . . .) which are necessary to meet requirements which are other than local in nature." This posture contradicts the plain language of the statute, as well as the testimony received below concerning the implementation of the statute by the federal government (T.Tr. 555). Moreover, it also ignores the most recent expression with respect to this issue by the state of New Jersey -- the jurisdiction that has been the focus of this litigation -- that it intends to accommodate, not bar, OCS facilities. See e.g. New Jersey EPA, Alternatives for the Coast 1976 Ex. 224; NOIA Br. 37-38 & n.26.

over future pipeline placement after the collection of essential data and after a full opportunity for States through the CZMA process to determine preferred locations for pipeline corridors, appellees contend, like Judge Weinstein in his February 17 order, that the EIS should have nonetheless identified pipeline corridors before the Sale, before exploration and before any States have completed CZMA programs. The sole basis for this contention is the purported identification by Shell of pipeline corridors in its economic feasibility study.^{12/}

The patent inadequacy of appellees' (and the lower court's) reliance upon the Shell study appears from the contradictions that are contained in appellees' own briefs. Thus, for example, NRDC argues that the Shell study demonstrated that "specific pipeline routes could be selected and analyzed" (NRDC Br. 21) with at least a "useful measure of reliability," if not absolute precision (Id. at 22). However, later NRDC attacks the Shell analysis on the grounds that it was grossly mistaken -- e.g. that it did not look at

^{12/} NRDC asserts that both "Mr. Brunjes [the Shell pipeline planning witness] and Dr. Mitchell [NRDC's on-shore expert] showed" that the EIS could examine "possible alternative routes to determine their environmental impacts." (NRDC Br. 24-25). This reference to Dr. Mitchell's position, however, is not supported by any citations to the record. Moreover, our reading of Dr. Mitchell's testimony fails to reveal any instances where he suggested that specific pipeline corridors could be planned at the EIS stage of Sale 40. Instead, his testimony was far more general, condemning the EIS for allegedly inadequate allowance of acreage needed for pipeline right of ways, etc., and was rejected by Judge Weinstein in both his August 16 order and in his February 17 final decision. See e.g. P.Tr. 2732-33; NOIA Br. 49-50.

"routes to northern New Jersey, although the single largest bidder, Exxon, has its refineries in northern New Jersey." (NRDC Br. 51). Similarly, Suffolk County relies upon the Shell study in order to show that it was possible at the EIS stage of the project to identify at least likely pipeline corridors (S.C. Br. 8-9), but then later sets forth a host of unknown factors^{13/} which it contends must be resolved in the future before there can be any decisions concerning whether pipelines should even be used. (S.C. Br. 19-20). And finally, Nassau County stresses that "several coastal states or counties [could] require extensive pipeline rerouting over significantly greater distances than are presently contemplated by Interior." (N.C. Br. 8). Thus, all of the appellees who address the pipeline location issue in effect agree that there are too many uncertainties prior to exploration to permit useful speculation about pipeline corridors.^{14/}

^{13/} E.g., on site investigations; consideration of investment risk and cost of money; possibility of mix of pipelines, tankers and barges; cost of complying with pollution reliability and other regulatory requirements; sea bottom routing; cost of installation of offshore platforms; particular terrain; legal and construction problems incident to land pipeline routes; cost of compliance with CZMA program, etc.

^{14/} In the 16-page brief filed by Concerned Citizens of Montauk, there is little discussion of the pipeline location issue, other than to quote Judge Weinstein's condemnation of the EIS for failing to provide "state and local decisionmakers and the public" with information concerning "routes of transport of Sale 40 oil and gas, and to enable government decisionmakers to understand and plan to cope with the impacts of reasonably defined tanker-pipeline options in their zoning, land use and coastal zone management planning process." (Dec. 36, JA 58). While we, of course, disagree with this condemnation of the EIS, we also note that an EIS is not itself a planning document and its adequacy cannot be judged as though it were. *Concerned About Trident v. Rumsfeld*, 9 E.R.C. 1370, 1381 (D.C.Cir.1976).

But we are not compelled to rest upon appellees' own contradictions and confusion with respect to the Shell study. The Brunjes testimony speaks for itself and makes absolutely clear that contrary to Judge Weinstein's finding, industry does not "routinely select" pipeline corridors prior to an OCS sale, but instead merely investigates, on a general and preliminary basis, the possible economic feasibility of pipelines.

Mr. Brunjes repeatedly stressed the uncertainties underlying the Shell study:

"[N]o one really knows what oil is there and what oil, if any, is there and what the life of the field is. I believe what information I was given was also a big assumption." (T. Tr. 935).

"[T]his information -- I mean, they [Shell exploration personnel] did not know just [what] they were dealing with, either." (T.Tr.938-39).^{15/}

Because of the need to make gross assumptions, the Shell study presented only a "possible scenario," not a prediction as to where actual pipeline corridors would be placed (T. Tr. 945). And even this "possible scenario" was only one of many that Shell might have used:

"[W]e looked at three [producing] areas. We looked at [production] rates, four different rates, 25, 50, 125, 200 [thousand barrels/day]. We looked at many different combinations. Then you apply the rooting [sic routing] to each of those computations. There are infinitely a number of more that one can look at." (T.Tr. 946-46)

^{15/} See also T. Tr. 927:

"[W]e are dealing with completely unknowns here. We haven't - you know, nobody has shown a trace of hydrocarbons there yet so it's all an assumption."

Mr. Brunjes went on to describe the type of additional information that would be necessary to locate specific pipeline corridors. He agreed that a significant ingredient determining ultimate pipeline location would be the identity of the lessee who actually discovers oil on its tract. (T. Tr. 953, 979). He stated that the location of pipeline routes would be affected by the size of the field, its ultimate location, the time spent in exploration, and other factors that were not known at the time of the Sale 40 leasing decision and cannot be known even now. (T. Tr. 979).

Mr. Brunjes read from the Shell study itself to articulate other uncertainties that would ultimately have to be resolved:

"[quoting from Ex. 252, the Shell study]
As this study progressed, it became more
and more evident that before final selection of a crude oil transportation system is made for the mid-Atlantic-Baltimore Canyon any [sic many] aspects would require further extensive in-depth study," (T. Tr. 1021), [including]

* * *

"detailed surveys and studies of the sea bottom topography and investigation of potential problems of sand waves, cemented sands and bottom scour must be made before final selection of pipeline routes are made in this area" (T. Tr. 1022); ^{16/}

16/ As Mr. Brunjes further testified

"Q. The results of that [sea bed survey] investigation might cause you to modify or even abandon a particular pipeline route if you found that the conditions were too formidable or too costly to resolve; is that right?

"A. That would be the general purpose as I would understand it." (T. Tr. 1023).

"[D]etailed studies [would be] needed by on-site investigations of land pipeline routes . . . together with an analysis of permanent and right of way requirement before final selections are made (T. Tr. 1024);

* * *

"In general, to cross extensive areas like that, very extensive information must have been developed as to the environmental effects of that particular crossing site for the particular size line of the particular construction activity one is advocating" (T. Tr. 1025).

Finally, CZMA regulation and programs would have to be adequately addressed. (T. Tr. 1025).

Mr. Brunjes went on to explain that the type of information ultimately needed to make pipeline routing decisions could not now be obtained:

"it wouldn't be prudent to commit vast energies in the way of human resources and money to consider alternative [pipeline routes at this time] in infinite detail." (T. Tr. 941).

It is only after:

"oil is found [that] one starts trying to select precise routings and then try to develop all the environmental factors and impacts and things of that nature; this report, certainly, does not even allude to touch on those things." (T. Tr. 1021).

Indeed, he testified that even the basic question of whether to choose pipelines, as opposed to tankers:

"will have to stay open until oil is found and the extent of the reserves and the life of the field, the production rights to be determined. It really can't be defined until that time." (T. Tr. 944). 17/

Thus, as Mr. Brunjes repeatedly made clear, the Shell study was only a "preliminary study" that indicated to Shell

17/ Of course, the lessees are not free to select whatever transportation plans they desire. Under the lease stipulations (Ex. T-5A, JA 2727), the lessees are bound to use pipelines, unless they are not economically or technically feasible.

"that pipelines would seem to have the edge from a feasibility and economic cost study for the main transportation routes on the more direct routes." (T. Tr. 987). Its purpose was simply "to identify the feasibility, the technical feasibility and idea of the cost." (T. Tr. 946), not the locations where pipelines might land Sale 40 oil. Indeed, the study on its face reported that:

"The results of this study are based on feasibility and economics only. Other factors such as investment risk, pollution hazards and reliability must also be taken into consideration when specific transportation schemes are selected." (T. Tr. 993, quoting from Ex. 252).

In short, when the Brunjes testimony is properly considered and when all of the unknowns, qualifications, and assumptions that went into the Shell study are set forth, it is clear that Mr. Brunjes was quite correct in his testimony that "it would be very premature at this time to speculate as to an exact routing involved" in Sale 40 pipelines. (T. Tr. 942). The Shell study simply indicated that pipeline routes to the New Jersey shore are economically feasible, or so it appears on the data now available, over virtually any conceivable route, including those which would wholly avoid the New Jersey beaches and land inside Delaware Bay. The study cannot, therefore, be relied as an indication of actual pipeline corridors.^{18/}

^{18/} In apparent discomfort with Judge Weinstein's reliance upon the Brunjes testimony to place an obligation upon Interior to investigate specific pipeline corridors, appellees seek also to attack the EIS for not "costing out" the various transportation alternatives in the way that Shell did. (NRDC Br. 27-28). There are several answers to this contention. In the first place, there

[footnote cont.]

B. Appellees Have Failed to Rebut Appellants' Other Arguments Concerning Judge Weinstein's Resolution of the State and Local Land-Use Regulation Issue.

Aside from their unwarranted reliance on the Shell economic feasibility study, appellees also attempt to support Judge Weinstein's resolution of the land-use regulation issue by relying upon the CEQ guidelines to criticize the EIS's analysis of state and local land-use regulation (NRDC Br. 39; N.C. Br. 3-4) and by contending that the EIS failed to discuss the actual impact of local opposition upon Sale No. 40 operations (NRDC Br. 41; N.C. Br. 5, 9; T.C.C. Br. 25). As we demonstrated in our opening brief, the EIS set forth a comprehensive general discussion of state and local land-use regulation which is in accord with the CF guidelines and which is more than adequate, given the present impossibility of specifying particular locations of pipelines or other OCS facilities. (NOIA Br. 32-34). As we also demonstrated, the EIS dealt extensively with the "impact" of possible local and state opposition by analyzing, in detail, the environmental consequences of tankering oil to shore should pipelines or other OCS facilities be vetoed. (NOIA Br. 35).

[footnote cont.]

is no evidence in the record that Interior did not undertake such an analysis when determining that there was broad feasibility in running pipelines from the Sale No. 40 area to shore. In fact, the technical papers that accompanied the draft EIS (Technical Paper No. 1 Exh. 19) set forth "hypothetical oil pipeline routes" and allowed for "some extra mileage under the assumption that the most direct route was not always feasible due to environmental considerations." (*Id.* at 53). Second, Interior's performance of a Shell-type study would from all that appears simply have verified the assumptions contained in the EIS (II EIS 227) and in the supporting technical papers (Ex. 19, pp. 52-53) that there is a wide degree of flexibility with respect to adoption of pipeline corridors. Interior could have been faulted on this score only if the Shell analysis had contradicted the basic assumptions made in the EIS.

The appellees devote the major portion of their briefs on the land-use regulation question to discussing an allegedly solid phalanx of New Jersey, state, county and town governments with both existing laws and elected officials resolutely committed to barring, vetoing or otherwise prohibiting the landing of any pipelines from the Sale 40 region. Judge Weinstein's decision cannot be sustained on the basis of such arguments.

In the first place, as noted previously, the State of New Jersey in its most recent articulation of its policy toward the OCS program has indicated that its posture with respect to Sale 40 is positive, not hostile. (NOIA Br. 37-38 & n.26). Moreover, even Cape May County, the local jurisdiction which appellees have chosen to make the focus of their proof, indicated both in comments to Interior prior to the publication of the final EIS and in trial testimony that pipelines from the Sale 40 region should be mandated, not that Cape May County would veto them. (NOIA Br. 39). Also in the trial testimony given on behalf of Cape May County, it simply asserted that the county wanted to insure that coastal energy facilities are properly planned and operated. (T.Tr. 123-24).^{19/}

^{19/} See also T.C.C.Br. 13 (emphasis in original):
"[T]hese towns and counties [of the Jersey shore]
... do not oppose OCS development so long as it
is done properly with timely and meaningful en-
vironmental evaluations."

And even when obviously trying to convince this Court that pipelines will be vetoed, T.C.C. is reduced to making the unsubstantiated claim that "some [unidentified] of the Southern New Jersey counties presently are fully prepared to prohibit OCS development and pipelines." (T.C.C. Br. 24). The hollow character of this vague threat is revealed by trial testimony which demonstrated that county governments have no binding land-use authority. (T.Tr. 122-23).

A second answer to appellees' contentions on this score is that the solid wall of "hostility" which they perceive was based on de novo court testimony and was not part of the administrative record compiled by Interior prior to the publication of the final EIS. Quite to the contrary, there were several forceful and articulate spokesmen from the Atlantic beach communities in New Jersey who spoke out in favor of Sale 40 in unequivocal terms. Thus, for example, Mayor Joseph Bradway of Atlantic City, "New Jersey's largest resort" strongly endorsed Sale 40:

"Development of the OCS has been delayed longer than it should have been. The best interest of the national economy and the American public at large are not being properly served with any further delay. (Ex. T4-0 p. 128, JA 2710)

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"In summary, I believe that the economic benefits coupled with the national benefits outweigh the possibility of an oil spill. I further believe that a curtailment of energy use would be economically harmful. I feel that this country has economically progressed based on its national unity. Let that progression not be thwarted by parochialism and emotional fears." (Id. at 130-31, JA 2712-13)

Mayor Bradway's statement was consistent with the statement given by Mr. Worthington, the County Executive of Atlantic County (where Atlantic City is located), who testified quite clearly that he was not opposed to pipelines coming ashore at all points in Atlantic County and who recognized that the national interest required development of the Mid-Atlantic OCS. (Ex. T-4L pp. 43-44, 46-47, JA 2705-06, 708-09).

Finally, we remind the Court of Mr. Brunjes' conclusion that the Atlantic beaches could be bypassed altogether and oil

pipelines could be landed inside Delaware Bay in and near Cumberland County at a cost well below that associated with tankering oil.^{20/}

In sum, the "hostility" relied upon by the appellees in this case to support Judge Weinstein's decision simply will not withstand analysis. The evidence in this case illustrates no such general hostility. It also indicates that any isolated pockets of opposition to OCS pipelines can be easily avoided, after exploration first determines the essential factors needed for pipeline corridor planning.^{21/}

IV. APPELLEES HAVE FAILED TO REFUTE APPELLANTS' DEMONSTRATION OF THE ERRORS INVOLVED IN JUDGE WEINSTEIN'S ANALYSIS OF ALTERNATIVES

As we explained in our opening brief (pp. 39-50), Judge Weinstein rested his conclusion that Interior had inadequately explored certain alternatives to Sale No. 40 principally upon the testimony of Ms. Gresham, a staff employee of the New York BLM office who was engaged solely in pre-EIS tract-selection activities. We pointed out that under Aberdeen & Rockfish R.R. v. SCRAP, 422 U.S. 289 (1975) (SCRAP II), as well as a lower court decision directly on point, such testimony has no legal significance with respect to

^{20/} See Ex. T-5C (JA 2812) indicating transportation costs of approximately \$.85/barrels via route 2 (inside Delaware Bay) at an assumed level of 100,000 barrels per day production, compared to tankering costs of \$1.55 via tanker at the same level of production.

^{21/} The T.C.C. argument (Br. 28) as to an alleged hiatus in New Jersey law with respect to granting right-of-ways within the three-mile limit is simply a rehash of testimony given by T.C.C.'s attorney at trial which Judge Weinstein properly rejected. (T.Tr. 376, 416, 420).

Interior's compliance with NEPA. Apart from NRDC's reliance on an aspect of Calvert Cliffs Coordinating Committee v. AEC, 449 F.2d 1109 (D.C. Cir. 1971), cert. denied, 404 U.S. 942 (1972) (NRDC Br. 38-39), which was explicitly disapproved by the Supreme Court in SCRAP II, 422 U.S. at 321 n. 20, appellees do not really challenge this contention.^{22/} While Judge Weinstein's error in this regard is sufficient reason, standing alone, to reverse his ruling on the alternatives issue, there are additional considerations which further demonstrate the fatal flaws in his decision.

Judge Weinstein demanded the same rigorous analysis of separation of exploration and development as would be required in considering alternatives which would completely eliminate the environmental impacts associated with the proposed action. See e.g., his heavy reliance upon NRDC v. Morton, 458 F.2d 827 (D.C. Cir. 1972), which involved alternatives to OCS leasing in general. However, the restructuring of leasing to allow the separation of exploration and development, does not promise the elimination of any environmental impacts associated with it.

^{22/} We also must note the misstatement set forth in the Nassau County brief (p. 35) that Ms. Gresham "freely admitted" that "a separation alternative" was "never seriously considered by the BLM office in New York City" and that "this office . . . prepared the EIS documents themselves." As NOIA set out in its opening brief (pp. 41-43), and as the other appellees effectively conceded by their silence, the Gresham testimony was limited solely to a description of the pre-EIS, tract-selection process and had nothing to do with the preparation of the EIS itself.

The significance which appellees nonetheless attach to the separation of exploration and development (S.C. Br. 50-57) rests upon their description of the Secretary's continuing regulatory controls over OCS leasing as it is presently structured, as being no more than "window dressing" (NRDC Br. 4; N.C. Br. 1-2) with no significance as to the issues raised in this case. Separation of the two phases of OCS activities is thus asserted to be necessary to allow for meaningful environmental protection of the OCS. (NRDC Br. 79-80). But, as the Fifth Circuit recognized in Sierra Club v. Morton, (MAFLA), 510 F.2d 813, 828 (1975), which excused the absence of any discussion of the alternative federal exploration, OCS lessees under present law are subject to rigorous regulation which allows Interior "continuing opportunity for making informed adjustments" to protect the environment following leasing itself. And, as the Ninth Circuit held in Union Oil v. Morton, 512 F.2d 743, 749 (1975), the Secretary has "full authority" under NEPA and the OCS Lands Act to "regulat[e] drilling under Government leases with an eye to the protection of the environmental quality of the continental shelf."

Former Secretaries have in the past and the present Secretary has now given every indication of their intention to exercise regulatory control and maintain rigorous supervision over all aspects of OCS operations. ^{23/} Thus, each lease issued for Sale No. 40 contains a provision requiring lessees to

23/ See e.g., 30 C.F.R. § 250.43 (Pollution and Waste Disposal); § 250.44 (Well Abandonment); § 250.46 (Workmanlike Operations); § 250.41 (Control of Wells, including requirements for drilling, well casing and cementing, drilling mud, blowout prevention equipment and completed wells).

conduct operations in accordance with those regulations, as they may be revised or supplemented. (Ex. T-5A, JA 2723). Additionally, the Secretary has specifically provided by regulation for the suspension of any operations which threaten immediate, serious and irreparable harm to the environment,^{24/} as well as opportunity^{25/} for state input concerning OCS lessees' development plans.

And, of course, leases issued pursuant to Sale No. 40 are also subject to OCS operating orders which mandate operating practices, for such matters as drilling procedures, pollution control and the like.^{26/}

Secretary Andrus has already announced that a supplemental EIS will be written for the developmental phase of Sale 40, when pipeline corridors can be meaningfully projected. Far from being

24/ 30 C.F.R. § 250.12(c); see also Gulf Oil v. Morton, 493 F.2d 141 (9th Cir. 1973).

25/ Of particular interest here in the light of the issues relied upon by Judge Weinstein below is 30 C.F.R. § 250.34 and proposed OCS Order No. 15, (Ex. T-4B, T. Tr. 128-31), designed to implement that regulation. That order will require for Sale 40 and other new OCS areas that lessees furnish to the Governors of directly affected states advance detailed information concerning the onshore impacts of their proposed development plans, such as the proposed location of pipelines, and many other facts bearing upon OCS development. All of this information must be furnished to a Governor at least 30 days in advance of the filing of a development plan with the USGS, and must give him (or her) 60 days for comment. Moreover, the development plan itself must be submitted "at least six months in advance of the contemplated date for commencement of operations in order to allow time for an adequate review by personnel from the States . . ."

Suffolk County's criticism of Order 15 (S.C.Br.12) for alleged incompatibility with the CZMA ignores the fact that that order is not designed to apply where States have approved CZMA programs. Instead, it will serve to ensure that States will have non-CZMA channels to obtain information concerning OCS onshore impacts prior to adoption of their CZMA programs.

26/ See generally Ex. F, JA 3239.

"window dressing," this announcement is further evidence of Interior's intention to exercise, in an environmentally-sensitive manner, its regulatory authority over OCS operations, which was recognized by the Fifth Circuit in MAFLA, but was totally ignored by Judge Weinstein in his opinion below.

Thus, the broad regulatory authority of the Government over OCS lessee activities further depreciates the significance of the division of exploration and development and constitutes additional evidence of the adequacy of the EIS's and PEIS's extensive discussion of this issue. (NOIA Br. 45-46).

Finally, appellees urge that the EIS should be faulted here for failing to analyze in detail alternative sites for Mid-Atlantic OCS operations. In that regard, they rely upon NRDC v. Callaway, 524 F.2d 79 (2d Cir. 1975), which held an impact statement invalid for failing to consider with more care alternative dumping sites for matter dredged from a river bottom. (NRDC Br. 76). But OCS production can only take place where there are hydrocarbons. As Ms. Gresham clearly and explicitly testified, the USGS, acting on the basis of geological information which it collected, as well as information provided to it by industry, had a "non-existent" interest in leasing tracts other than those selected for scrutiny in the Sale No. 40 EIS, because it did not believe oil would be found in other areas of the Mid-Atlantic region. (T. Tr. 717, JA 1648, see also Id. at 726-27).

She also testified that industry "interest [in these other areas] was very low," thus confirming the USGS analysis. (T. Tr. 716, JA 1647). That being the case, obviously no meaningful purpose under NEPA would have been served by a more than exhaustive analysis of these other Mid-Atlantic tracts that contained in the EIS. (II EIS 502-16).^{26/}

V. APPELLEES HAVE NOT CONTRADICTED APPELLANTS' SHOWING THAT JUDGE WEINSTEIN ERRED BY ENGAGING IN SUBSTANTIVE REVIEW OF SALE 40.

In our opening brief (pp. 50-60) we demonstrated that under the rubric of a cost-benefit analysis, Judge Weinstein improperly took evidence de novo focusing on the internal decision-making documents underlying Sale No. 40, and credited that evidence without acknowledging other conflicting evidence in the record. As noted above (pp. 2,7-8) appellees do not really deny that Judge Weinstein so approached the evidence in condemning the Sale 40 decision because of purported errors in decisional documents as to the investment costs and production rates associated with Sale 40. Instead, they seek to justify the lower court's reliance on such non-environmental issues as being no more than a review of the

^{26/} In judging the adequacy of the EIS in this regard, it is also significant that no States suggested that Interior should chose other tracts for leasing because of potential state or local vetoes or regulation of pipelines from the Sale No. 40 region. (T. Tr. 724, JA 1655).

precise and careful "cost benefit" analysis which they contend is mandated by NEPA.^{27/}

But, all the appellate courts that have faced the question have uniformly recognized that nothing in NEPA requires such a precise mathematical evaluation of federal actions affecting the environment.^{28/} See Robinson v. Knebel, No. 76-1459 (3d Cir. March 2, 1977); Cady v. Morton, 527 F.2d 786, 797 (9th Cir. 1975); Trout Unlimited v. Morton, 509 F.2d 1276, 1286 (9th Cir. 1974). Instead, all that NEPA requires, is a "broadly defined" evaluation, Chelsea Neighborhood Associations v. United States Postal Service, 516 F.2d 378, 386 (2d Cir. 1975), ensuring that the environmental effects of a project are taken into account and that decisions as to major federal actions are not determined solely by the economic and other factors which have traditionally been considered by decisionmakers. Sierra Club v. Morton, MAFLA, supra 510 F.2d at 827. In essence, therefore, cost-benefit analysis under NEPA is merely synonymous with inclusion of the environmental factors outlined in section 102 in the decisionmaking process. Chelsea Neighborhood,

27/ See Sierra Club v. Froehlke, 359 F. Supp. 1289, 1362 (S.D. Tex. 1973), rev'd on other grounds sub. nom. Sierra Club v. Callaway, 499 F.2d 982 (5th Cir. 1974), for a thorough discussion of the traditional -- i.e. non NEPA -- context in which the term cost-benefit analysis has been employed.

28/ The EIS contains no mathematically expressed or specific cost-benefit analysis. III EIS 41. Suffolk County's attempt to distinguish other cases on the ground that they involved impact statements without such an analysis (S.C. Br. 42, 82) is, therefore, misconceived.

29/
r , 516 F.2d 386-87.

In this case, however, Judge Weinstein used the review of cost-benefit analysis as a ticket for evaluating the economic, not environmental, effects of the project, and thus assumed that NEPA gave him carte blanche to review in minute detail the economic analysis undertaken in connection with it. However, NEPA (specifically section 102, the so-called "procedural" provision of the statute) vests authority in federal courts only to ensure that

29/ NRDC relies heavily on the lower court's opinion in Chelsea Neighborhood Associations v. U.S. Postal Service, 389 F. Supp. 1171 (S.D.N.Y. 1975), for the proposition that NEPA permits evaluation of a decisionmaker's "data base." Yet that case, far from supporting appellees' position, reveals its weaknesses. In Chelsea Neighborhood, this Court affirmed the district court's conclusions that an EIS prepared in conjunction with a proposal to construct a combined vehicle maintenance facility and housing project was incomplete because of its failure to adequately evaluate the impact of the proposed housing, the alternative possibility that no housing would be built and other alternatives to the proposed action. 516 F.2d at 327. The opinions of both courts make clear, however, that NEPA was violated because the environmental data base of the project were not adequately presented. 389 F. Supp. at 1182-84. Similarly, in I-291 Why: Association v. Burns, 372 F. Supp. 223 (D. Conn. 1974), aff'd per curiam, 517 F.2d 1077 (2d Cir. 1975), and NRDC v. Callaway, 389 F. Supp. 1263 (D. Conn. 1974), rev'd, 524 F.2d 79 (1975), it was the environmental "data base" that the courts found to be deficient.

environmental issues are considered and adequately disclosed to a decisionmaker. It has nothing to do with the accuracy of the economic data relied upon by the decisionmaker.

Not surprisingly, the district court's action in the instant case is unprecedented. Although NRDC claims that "challenges are frequently addressed to deficiencies in the economic and technical, as well as environmental, bases utilized by the agency in its cost-benefit balancing" (NRDC Br. 69) neither it, the district court, nor any appellee has cited a single case in which a court relied on such factors to find a violation of NEPA.^{30/}

Thus, it is clear that the district court's actions went beyond the carefully tailored requirements of section 102. For the protests of the appellees notwithstanding, the district court's opinion can only be read as a non-section 102 -- i.e. non-procedural -- challenge to Sale 40 which really attacks the substance of the Sale 40 decision itself.^{31/}

We showed in our opening briefs that NEPA substantive review -- i.e. review under section 101 -- is improper, particularly after the clarification of the statute offered by the Supreme Court last term in Kleppe v. Sierra Club, 427 U.S. 390 (1976). In any event,

^{30/} NRDC also states that it has found no circuit court reversal of a finding of non-compliance with NEPA that, inter alia, "it was improper . . . to review economic and/or technical matters in the decision's data base." (NRDC Br. 69-70). NRDC neglects to mention that no appellate court has ever been asked to review the type of issue presented by the decision below. And, certainly, contrary to Suffolk County's claim (Br. 25-28), NRDC v. Morton, supra, involved no such issue.

^{31/} Of course, contrary to the appellees' implication, the district court's disclaimers of "substantive" review are entitled to no weight. Independent Meat Packers Association v. Butz, 526 F.2d 228, (8th Cir.1975).

those few pre-Kleppe decisions which sanctioned substantive review under NEPA have appreciated that the scope of such review is quite limited,^{32/} permitting a court only to determine whether the agency's actual balance of costs and benefits was arbitrary and capricious or clearly gave insufficient weight to environmental values.^{33/}

And that conclusion could be reached only if the record as a whole contained no evidence on which the decision could be logically based, a finding that Judge Weinstein could not and did not make here.^{34/}

32/ EDF v. Corps of Engineers, 492 F.2d 1332 (5th Cir. 1974); EDF v. Corps of Engineers, 470 F.2d 289 (8th Cir. 1972). See Silva v. Lynn, 482 F.2d 1282, 1283 (1st Cir. 1973).

33/ See e.g., EDF v. Corps of Engineers, supra, 470 F.2d at 299, n.15. Calvert Cliffs' Coordinating Comm v. AEC, 449 F.2d 1109, 1115 (D.C. Cir. 1971). It is ironic that NRDC's argument that the court's conclusions on cost-benefit analysis do not amount to substantive review opens with a citation of Calvert Cliffs' and the statement that the finding of the district court "fits squarely into the current state of the law on the subject." NRDC Br. 60. Calvert Cliffs' is, of course, the seminal case calling for substantive review of agency decisions under NEPA. See, e.g., Minnesota Public Interest Research Group v. Butz, 541 F.2d 1292, 1300 (8th Cir. 1976).

34/ The extraordinary nature of Judge Weinstein's decision is further revealed by the fact that in no case where a court of appeals found that it had the power of substantive review did it actually reverse an agency's decision. In most instances, the courts have themselves determined that an agency's decision to proceed was not arbitrary and capricious. E.g., Concerned about Trident v. Rumsfeld, 9 E.R.C. 1370, 1382 (D.C. Cir. 1976); EDF v. TVA, 371 F. Supp. 1004 (E.D. Tenn. 1973), aff'd, 492 F.2d 466 (6th Cir. 1974); Sierra Club v. Morton, MAFLA, supra. In a few, the courts have remanded to the district court to undertake substantive review. E.g., Conservation Council v. Froehlke, 473 F.2d 664 (4th Cir. 1973). In fact, the only appellate court that reviewed a holding that an action was arbitrary and capricious under NEPA, reversed the district court. Minnesota Public Interest Research Group v. Butz, 541 F.2d 1292, 1307-08 (8th Cir. 1976) rev'g 401 F. Supp. 1276 (D. Minn. 1975).

Appellees' assertion that Judge Weinstein did not rely on section 101 to pass upon the substance of the Sale 40 decision itself, but instead used section 102 procedural review to invalidate that decision because of purported flaws in the economic data, hinders, not helps, their cause. For assuming that he so approached the issue, he would have applied NEPA section 102 analysis to economic data and thus would have expanded the statute far beyond the contours that have been laid out even by those courts which have sanctioned actual substantive review.

If the economic data underlying a major federal action could be subjected to the kind of scrutiny employed by courts under section 102 to evaluate environmental analysis and if federal decisions could be invalidated, not because they are demonstrably arbitrary and capricious, but because economic data is inadequate, then NEPA would become much more than an environmental statute. It would be turned into an all-purpose, general review statute enforced by a judiciary expected to test the adequacy of all data bearing upon every major federal action. There is no support in the case law or in the language of NEPA for this view of the statute.

There is finally still another flaw in the argument advanced by appellees here. Judge Weinstein was content to find what he regarded as serious mistakes with respect to three of the many economic factors underlying the Secretary's analysis of the economic benefits of the Sale 40 decision. He did not, however, find that those factors were so central to the Sale 40 decision that had the Secretary been, in Judge Weinstein's view, properly

provided with accurate information he would have decided not to authorize Sale 40. But under even less demanding standards than the arbitrary and capricious test, courts are not entitled to reverse an agency's decision unless there is "solid reason" to believe that absent the error, "the agency would not have arrived at the conclusion at which it did arrive." Communist Party of United States v. Subversive Activities Control Board, 367 U.S. 1, 67 (1961). See also Massachusetts Trustees of Eastern Gas and Fuel Associates v. United States, 377 U.S. 235 (1964); Kerner v. Celebrezze, 340 F.2d 736, 740 (2nd Cir.), cert. denied, 382 U.S. 861 (1965).^{35/} Moreover, the burden of showing that the error is not harmless clearly rests on the party challenging the agency's action. NLRB v. Seine and Line Fishermen's Union of San Pedro, 374 F.2d 947 (9th Cir. 1967), cert. denied, 389 U.S. 913 (1967).

In the instant case, no evidence was introduced and no findings were made to indicate the purported economic errors relied upon by Judge Weinstein were material to the Sale 40 decision. No such finding could have been made. It is, after all, industry, not the Government, which must pay the finding and pipeline costs that were allegedly understated. And minor errors in production rates, which are themselves necessarily keyed to reserve levels that cannot possibly be known now, could not have effected the Sale 40 decision. The district court's assumption that the errors which it discerned nonetheless made the Sale 40 decision "arbitrary and capricious" was thus a patent error of law requiring reversal of

^{35/} See also Greater Boston Television Corp. v. FCC, 444 F.2d 841 (D.C.Cir. 1970).

the decision below.^{36/}

^{36/} Appellees' response to the demonstration in our opening Brief that Judge Weinstein erred as a matter of both law and equity in the remedial aspects of his decision requires no extensive reply. NRDC's assertion that Judge Weinstein's decree is "not radical" because Interior "must simply go back and do the necessary environmental analysis" (NRDC Br. 5), so calliously understates the drastic consequences of Judge Weinstein's decree that it effectively answers itself. The same is true as to NRDC's reliance upon other NEPA cases where "permits have been withdrawn" to refute NOIA's prior demonstration (Br. 61-65) that NEPA does not affect the careful statutory scheme of the OCS Lands Act to vest fixed and certain property interests in OCS lessees.

Finally, as to the contention that there is no serious indispensable party issue here because of NOIA's presence in the litigation (S.C.Br. 91-94) -- a position similar to that taken in Suffolk County's unsuccessful effort to have this Court refuse to receive the amicus brief filed by four lessees -- there is nothing in NOIA's charter nor its by-laws which enables it to represent the proprietary interests of lessees in this case. NOIA entered this case before Sale 40 took place. Its purpose was then and is now simply to advance its interest and that of its members in developing the OCS, not to represent the proprietary interests of OCS lessees.

CONCLUSION

For all the reasons stated above and in our opening brief, Judge Weinstein's decision of February 17, 1977, should be reversed.

Respectfully submitted,

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